UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH
(Filed Electronically)

CRIMINAL ACTION NO. 5:06CR-19-R
UNITED STATES OF AMERICA, PLAINTIFF,

vs.

STEVEN DALE GREEN, DEFENDANT.

RESPONSE TO UNITED STATES' MOTION FOR TRIAL DATE

Comes the Defendant, Steven Dale Green, by counsel, and for his response to the motion of the United States to set this matter for trial on August4, 2008, says as follows.

Introduction

PFC Green was indicted in November, 2006, for, *inter alia*, murders and rape allegedly committed by him and others in March, 2006, while they were soldiers in the United States Army engaged in active combat duty in the extraordinarily dangerous Iraqi war zone known as the "Triangle of Death".

PFC Green is charged under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §3162(a)(2). This prosecution is unique, in that—to defense counsel's knowledge—PFC Green is the first United States soldier or former soldier to ever be charged under this statute. More specifically, PFC Green appears to be the first person to be charged in a

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Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

civilian court with allegations of crimes that occurred while serving as a United States soldier in a war zone. Unlike his military co-accused and all similarly situated defendants before him, PFC Green does not face prosecution under the Uniform Code of Military Justice before a military court-martial with its radically different procedures, protections, penalties, and range of punishments.

PFC Green's case is also exceptional in that—again, unlike his military co-accused—the United States is seeking to execute him. Even though the equally culpable military co-accused include two of PFC Green's Army superiors, none of them faced the prospect of the death penalty in their military court-martials. Indeed, the *worst* sentence imposed on any of them will result in parole eligibility in 10 years. The *best* sentence PFC Green can possibly receive if convicted is life imprisonment without the possibility of parole. This, despite the fact, that his two superiors (SGT Paul Cortez and SPC James Barker) were convicted of the same multiple murder and rape charged here. A third co-accused, PFC Jesse Spielman, was also convicted at court-martial. All of these soldiers will be eligible for parole within 10 years. PFC Green, on the other-hand, faces the prospect of execution following his civilian trial under the Military Extraterritorial Jurisdiction Act.

Despite the unusual and complicated nature of this case, the United States has moved the Court to set this matter for trial on August 4, 2008. The United States primarily argues the "public's right to a speedy trial" as grounds for the hastened trial date.

After consultation with the mitigation consultants, investigators, and psychiatric experts retained by counsel in the preparation of this unique and complex case, it is the

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Fax (502) 584-2808

position of the defense that the trial date requested by the United States is premature. The defense submits that a more appropriate trial date to insure that *both* the United States and the defense can be adequately prepared for this capital trial is April, 2009.

Defense preparation

To date, the defense has interviewed in depth over 70 witnesses in preparing this case for trial. A significant number of documents and other information has been processed. Psychiatric and neurological evaluations of the defendant is also progressing. However, an unknown quantity of discovery remains to be evaluated pending security clearances for defense team members. The parties are also in disagreement about other discovery matters and whether the United States must turn over certain information to the defense.

Further, now that the government has filed its notice of intent to seek the death penalty—a year after PFC Green's arrest—mitigation investigation is also ongoing.[1] All in all, defense and mitigation preparation have been progressing with diligence and all deliberate speed, given the resources available to counsel.

Specifically, among the reasons why an April, 2009, trial date is appropriate are the following:

> 1. Many of the troops in Mr. Green's platoon have redeployed to Iraq for 15 months and the earliest they will return is January, 2009. Defense investigators advise that they will need 90 days from their date of return to locate and interview these critical offense and penalty phase witnesses.

[1] To avoid unnecessary and unwarranted expense to the United States, the defense withheld some capital relevant investigation until the notice of intention to seek death was filed. The heightened scrutiny of all proceedings in a capital case required by the Eighth Amendment mandates that investigation now be conducted for both guilt and penalty phases of the trial.

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Fax (502) 584-2808

2. Many of these critical witnesses are not currently available to the defense due to the government's action of redeploying them. There are three options for interviews, but all three will require additional time:

a. Investigative personnel and counsel can go to Iraq and request the military to assist in bringing the witnesses to the Green Zone in order to interview them.

b. Investigative personnel and counsel can request the military to bring witnesses to a military post in Germany or Ahman, Jordan, for interviews. The United States has indeed offered to consider such assistance in locating said witness and making them available for interview. This option is being actively pursued.

c. Investigative personnel and counsel can interview them in the United States during the 3 months after they return from their tour of duty in Iraq.

3. Iraq investigation is necessary to:

a. View and investigate the crime scene and the Traffic Check Points (TCPs), which are alleged to have been the staging areas for the offense. No video or forensic reports are adequate to substitute for a reliable on-scene view and investigation.

b. No autopsy or independent and reliable forensic assessment of the condition of the victims is available. We have learned through independent investigation that some of the military's assertions that autopsies were prohibited by religious and cultural customs are misleading.

4. Percipient witnesses in the Iraqi community must be located and independently interviewed by the defense. The percipient witnesses include neighbors, extended family members, family members, and village leaders. Iraqi nationals who investigated the crime scene, observed the condition of the bodies, and tended to the bodies' removal and subsequent burial must be located and interviewed. Documentary evidence such as reports and photographs prepared by Iraqi Nationals must be obtained. Victims' family members must be located and interviewed to determine payment by the government and conditions of payment, potential other suspects, the family's

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relationship to insurgents, and victim impact evidence. The undersigned is not in favor of exposing team members to the dangers of an active war zone and will pursue all reasonable alternatives with the United States to obtain the necessary information short of actually going to Iraq. However, even if the necessity of actually traveling to the war zone is avoided, additional time will be necessary.

5. Military personnel who conducted the investigations, co-defendant informants, and percipient witnesses must be located and interviewed. Many of these witnesses are in Iraq.

6. Background investigation of percipient witnesses must be conducted.

7. Security clearances for additional team members may be requested so that they can 1) analyze classified information and compare it to information received during the course of investigation, and 2) review the classified materials that relate to combat treatment for psychiatric symptoms.

8. The volume of mitigation is enormous due to the circumstances of the offense, percipient witnesses to the conditions surrounding the offense, and the combat zone in which the offense occurred.

9. Insanity is a very viable defense according to psychiatric experts retained by the defense, however, they have requested considerable additional information in order to render their professional opinions. The information they have requested requires a thorough investigation into 1 through 8 above.

10. This is not a typical case for several reasons. The offense occurred in hostile territory during combat in a war where the lives of defense team members will be in danger in order to investigate at the scene. There is no adequate or reliable substitute for on-scene investigation. National security issues can be addressed without restricting access to percipient witnesses and crime-scene evidence. Indeed, members of the prosecution team have traveled to Iraq, and defense team members may have to do so, as well.

11. Defense experts also require a complete and reliable social history that includes a multi-generational history of family mental illness and family dynamics. There is substantial evidence that the defendant survived chronic and severe childhood maltreatment and that the family has a significant maternal and paternal history of mental illness. Considerable time will be necessary to thoroughly investigate these issues.

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> 12. The primary psychiatric expert retained by the defense has advised that although he has conducted interviews with the defendant and has good initial material necessary for evaluation, a final psychiatric opinion regarding defendant's state of mind at the time of the offense will take a considerable amount of additional time, as well as neurological and physical testing.

To this list is added the uncertainty of discovery. The government has acknowledged the existence of relevant and discoverable material that is classified due this connection this case has with the Iraq War. Efforts to obtain the necessary clearances for counsel are ongoing. It is difficult to commit to a firm trial date when it is still unclear what discovery exists and/or will be provided.

For these reasons, it is the position of the defense that trial should not be scheduled prior to April, 2009. In the alternative, another pretrial conference could be scheduled for February, 2008, by which time the parties will have a better idea of the volume of remaining discovery and the defense may very well have agreed with the government on procedures to interview witnesses and obtain evidence from Iraq without the necessity of traveling to the war zone.

The government dismisses these concerns and demands an earlier trial date. However, unlike PFC Green, the government has no constitutional right to a speedy trial, and articulates no legitimate public interest in hastening the commencement of these proceedings. Indeed, to do so would be a violation of the heightened protections offered to defendant by the Eighth and Fourteenth Amendments. Defendant is not asking to prospectively waive his Sixth Amendment right to a speedy trial "for all purposes" or "for

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200 Theatre Building
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Fax (502) 584-2808

all time". Zedner v. United States, 126 S.Ct. 1976, 164 L.Ed.2d 794 (2006)[2]. He is simply asking the court for a trial date that will allow sufficient time to prepare his defense.

Eighth Amendment Requirement of Heightened Scrutiny

Because the prosecution is subjecting defendant to the possibility of the death penalty, the Eighth Amendment requires greater reliability and heightened scrutiny of all rulings affecting the case. Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980); Zant v. Stephens, 462 U.S. 862, 884-885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); Woodson v. North Carolina, 428 U.S. 280, 304-305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). [3] The United States Supreme Court has stated that "[i]n capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability." Ford v. Wainwright, 477 U.S. 399, 411, 91 L.Ed.2d 335, 106 S.Ct. 2595 (1986). As the Supreme Court has proclaimed many times, "death is different" from other punishments. See, e.g., Gregg v. Georgia, 428 U.S. 153, 188 (1976).

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[2] Indeed, *Zedner* holds that a defendant may not prospectively waive his right to speedy trial under the Speedy Trial Act of 1974.

[3] The Sixth and Eighth Amendments require heightened scrutiny of the right to competent counsel in capital cases. In construing the Eighth Amendment, the United States Supreme Court has again and again laid down the principle that "death is different." See Harmelin v. Michigan (1991) _ U.S. __ [111 S.Ct. 2680, 2707, 115 L.Ed.2d 836, 864] for a listing of cases in which the Eighth Amendment has been held to require special protections for capital defendants. While the Court has focused most often on sentencing procedures, special considerations for capital defendants are also constitutionally required during the guilt trial. See, e.g., Beck v. Alabama (1980) 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392.

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Speedy Trial

The Sixth Amendment to the U.S. Constitution guarantees a *defendant* the fundamental right to a speedy and public trial. The Sixth Amendment reads:

> In all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence. (emphasis added).

Similarly, the Speedy Trial Act, 18 U.S.C. 3161, was designed to protect the *defendant's* right to speedy trial. Under the Act, this Court has already found this case to be complex[4] and concluded that it was unreasonable to expect adequate preparation for pretrial proceedings, or for the trial itself, within the time limits set by the Speedy Trial Act. 18 U.S.C. 3161(h)(8)(B)(ii).

Government's Previous Requests for Delay

In its recent pleading requesting an August, 2008, trial date, the government implies that this case is relatively simple and straight forward. In its Motion for a Trial Date, the United States says: "[w]hile defense counsel has frequently referred during further proceedings to the 'uniqueness' of this case, at its core, it is a rape and murder case committed overseas." (United States Motion for a Trial Date, pg. 3).

[4] The court's finding is contrary to the prosecution's new position that this is case is a simple rape murder case that occurred overseas. In fact, this case is the first instance of military personnel to be tried in a civilian court for an alleged offense committed while in the line of duty during war time.

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First, as outlined above, the case is extremely unique in that PFC Green is the first soldier or former soldier to ever be prosecuted in a civilian court for crimes that allegedly occurred in a war zone.

Second, again as noted above, the case is unique in that PFC Green faces the prospect of the death penalty. His co-accused, who faced the same allegations as PFC Green, did not face the death penalty.

Third, this matter is hardly just a case that occurred "overseas." The alleged crimes did not occur in a place like London, Paris, or Rome. Instead, the alleged crimes in this case, and the events leading up to them, occurred in arguably the most dangerous place in the world. At the time of the allegations, PFC Green was serving as a United States soldier in one of the deadliest areas of the Iraq, namely, the "Triangle of Death." The Triangle of Death is an extremely dangerous section of Iraq south of Baghdad. In the months leading up to the alleged offenses, PFC Green's unit lost numerous leaders and fellow soldiers to killings by Iraqi insurgents. One of PFC Green's superiors literally died in his arms in December, 2005, after he and another superior were shot at point blank range by an Iraqi civilian who was thought to be friendly to the Army.

In addition, despite its recent downpalying of the unusual nature and complexity of this case, the United States has previously asked for delays in this case *because* of its unusual nature and complexity. Nothing better illustrates the hypocrisy of the government's current position than its own words from July, 2006, when it sought a delay in submitting this case to a Grand Jury. In that pleading, the United States wrote:

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> The criminal prosecution of Green in the Western District of Kentucky involves the coordinated efforts of military prosecutors in Iraq with Department of Justice prosecutors in the United States. It involves the coordinated efforts of Army CID investigators and FBI agents both in Iraq and in the United States. It involves a crime scene located thousands of miles from the Western District of Kentucky, as well as witnesses and other items of evidence located far from here, and the Departments of Army and Justice will be necessary components of the prosecutions .... While the public and the defendant both have an interest in a speedy trial, the public is not served by an indictment which is presented in haste. If there were ever a case in which it was unreasonable to expect return and filing of an indictment with the thirty days required by subsection 3161(b), and where the ends of justice are best served by allowing the United States additional time to present and indictment, it is this case, and it is within the Court's discretion to grant such an extension.

United Sates Unopposed Motion to Continue Arraignment due to Anticipated Delay in Indictment, and for an Exclusion of Delay from Speedy Trial Calculation, pgs. 4 and 5.

The government's motion was granted, the Grand Jury proceedings were extended, and PFC Green's arraignment was continued from August 8, 2006, to November 8, 2006. (Court Order of July 20, 2006). Then, in September, 2006, the United States submitted a second motion regarding delay in the grand jury proceedings. This second motion noted that a delay was also being requested by the United States because it was seeking evidence from the Iraqi government. See, United States' Unopposed Motion for Speedy Trial Act Exclusion of Time Due to Submission of an Official Request for Evidence to a Foreign Government.

The delay sought by the United States was granted, and the Court ruled that this delay was properly excluded from the requirements of the Speedy Trial Act, pursuant to 18 U.S.C. 3161(h)(9). The United States ultimately utilized nearly every bit of the Court's

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extension, taking until November 2, 2006, to return the indictment herein.[5]

If the United States needed an extensive continuance of the grand jury proceedings just to return an indictment, how much more time is necessary to actually prepare to defend such a complex and difficult case at trial, particularly now that it is a death penalty case? The United States has at its disposal the combined efforts of the United States Army, the FBI, and the Department of Justice in its preparation for trial. Defense counsel must make do with significantly fewer resources.

Essentially, the United States must attempt to prove at trial the allegations of the case. The defense on the other hand must not only defend said allegations, but also prepare for a possible death penalty phase. Such a phase requires extensive investigation and preparation in even a "normal" death penalty case. Almost every aspect of a defendant's life must be examined because such may be relevant in the penalty phase portion of a capital trial. However, unlike the "normal" death penalty case, much of what may be relevant at the trial of this case occurred in a war zone.[6]

The Public's Right to a Speedy Trial

The Department of Justice asserts that an April, 2009, trial date unduly burdens the public's right to a speedy trial. This claim is unfounded and contradicted by the government's actions in similar cases.

[5] On November 30, 2006, the Court also found this case to be complex and concluded that it was unreasonable to expect adequate preparation for pretrial proceedings, or for the trial itself within the time limits set by the Speedy Trial Act. 18 U.S.C. 3161(h)(8)(B)(ii).

[6] On page 4 of its motion, the United States cites other death penalty cases and the time it took to proceed to trial. None of these cases involved events in a war zone.

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Fax (502) 584-2808

Society's interest in a speedy trial was articulated in Dickey v. Florida, 398 U.S. 30, 41-42 (1970).

> The public is concerned with the effective prosecution of criminal cases, both to restrain those guilty of crime and to deter those contemplating it. Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. [citations omitted.] Moreover, while awaiting trial, an accused who is at large may become a fugitive from justice or commit other criminal acts. And the greater the lapse of time between commission of an offense and the conviction of the offender, the less the deterrent value of his conviction.

Id., at 41-42. Here, the capacity of the government to prove its case will not be impaired if the trial occurs in April, 2009. The government's case is premised in large part on the testimony of the military co-accused, all of whom have given sworn testimony in other proceedings. Even if there were a lapse in memory, the prior sworn statements would be used to refresh the witnesses' recollection. Nor will PFC Green become a fugitive from justice, as proffered by the government. The defendant and his military co-defendants are all restrained and in custody.

Any deterrent value a conviction in this case might otherwise have is clearly compromised by selective prosecution of similar cases by the Department of Justice. Any prospective deterrent effect of a conviction herein is diminished by reports of similar injury and death to Iraqi civilians caused by U.S. military personnel whose convictions resulted in minimal sentences. Further damage is done to any potential deterrent effect when Iraqi civilian injuries and death at the hand of U.S. civilians—including those employed by the politically influential group Blackwater—are not prosecuted at all.

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Prejudice to the government

The government's arguments on how it (or the public) will be prejudiced by an April, 2009, trial date are vague at best. For example, the government states that the "failure to provide prompt trials 'enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system.'" (Government's Motion, Pg. 3). The government in no way articulates how the defense is "manipulating the system" by asking for a trial date later than the one the government prefers. And as for "pleas of guilty to lesser offenses," the government has not offered PFC Green any plea agreement what so ever. He certainly has not been offered anything like his co-accused, all of whom will be eligible for parole in no more than 10 years pursuant to their plea agreements.

In support of its argument, the government also states that "[a]s time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade." However, while such is good conjecture, the difference between the parties' respective requested trial dates is not so great that the government's preferred date insures reliable witness testimony, and the defense's does not. To put it another way, the government requests a trial date about 2 years after PFC Green's arrest. The defense requests one a little over 2½ years after his arrest. The difference of a few months does not make any significant difference to the prosecution's ability to present its case whatsoever. However, as for PFC Green being prepared for his death penalty trial, it could literally mean the difference between life and death.[7]

[7] Of note is the fact that the government often does not even charge a case until well into the five year statute of limitations imposed by federal law, even if it is made aware of the essential facts

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808

/s/ Scott T. Wendelsdorf
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

/s/ Patrick J. Bouldin
Assistant Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, Kentucky 40202
(502) 584-0525

/s/ Darren Wolff
Attorney at Law
2615 Taylorsville Road
Louisville, KY 40205
(502) 584-0525

Counsel for Defendant.

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of the case close in time to the allegation. A cursory review of cases in which the Federal Defender was recently appointed or litigated include the following: 1) The United States recently brought charges against a retired law enforcement officer, Roy Derry, for possession of child pornography. See, U.S. v. Derry, 3:07CR-143-C. According to the criminal complaint in that case, law enforcement allegedly found child pornography on the defendant's computer on December 9, 2005. However, the defendant was not charged by the United States until November 6, 2007, nearly two years later. During that two year period, he remained free in the community. 2) In U.S. v. William Green and Ricky Humble, 1:07CR-8-R, the defendants were charged with various Federal firearm charges. The indictment was the result of an undercover law enforcement operation. The dates of the alleged crimes were between February, 2002, and March, 2004. The indictment was not returned until March, 2007, some three years after the completion of the alleged crimes were known by law enforcement; 3) In U.S. v. Honey Lynn Wolfe, 5:03CR-39-R, the defendant was alleged to have murdered an infant in early August, 2002. The United States also claimed that the defendant confessed to committing the crime to the FBI on the night of the alleged murder. Despite this, the defendant was not charged with any crime until November, 2003 - some 15 months after law enforcement was made aware of the defendant's alleged crime and her alleged confession. The case, a non-death penalty murder prosecution, did not proceed to trial for another three years after indictment. The record does not reflect any demand for a "speedy trial" on behalf of the public by the United States. This, despite the fact that the events of that case occurred in Fort Campbell Kentucky, not in the Triangle of Death in Iraq. Similarly, the victim's family were also Kentucky residents. Ms. Wolfe was acquitted at trial.

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Federal Defender
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CERTIFICATE

I hereby certify that on December 13, 2007, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to the following: Marisa J. Ford, Esq., Assistant United States Attorney; James R. Lesousky, Esq., Assistant United States Attorney; and Brian D. Skaret, Esq., Attorney at Law.

/s/ Scott T. Wendelsdorf

Office of the
Federal Defender
200 Theatre Building
629 Fourth Avenue
Louisville, KY 40202

Tel (502) 584-0525
Fax (502) 584-2808